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Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

No. 89-176

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1989

* * * * * *

THE STATE OF IDAHO,

Petitioner,

v.

RICHARD ALBERT LEAVITT,

Respondent.

* * * * * *

BRIEF IN OPPOSITION

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SUPREME COURT OF THE UNITED STATES

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(9)

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ORIGINAL

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89-176

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October Term, 1989

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Petitioner,

v.

RICHARD ALBERT LEAVITT,

Respondent.

* * * * * *

BRIEF IN OPPOSITION

* * * * * *

MOTION FOR LEAVE
TO PROCEED IN FORMA PAUPERIS

* * * * * *

Pursuant to Rule 46.1 of the Rules of this Court, motion is hereby made that Respondent be allowed to proceed in forma pauperis. Respondent's Affidavit is attached to this Motion. Respondent was appointed the services of the Public Defender at the Trial Court level, and it has therefore not been necessary to request leave to proceed in forma pauperis prior to this filing.

DATED this 30th day of August, 1989.

DAVID N. PARMENTER
Attorney for Respondent

OPINION BELOW

The Idaho Supreme Court, in 1989 Opinion Number 78 (Appendix 1 - 19), reversed Richard Leavitt's death sentence for the following reasons: (1) The trial court's decision did not demonstrate an adequate weighing of mitigating circumstances against aggravating factors pursuant to the Idaho Death Penalty Statute; and (2) The trial court did not adequately consider long-term penal confinement as an adequate protection of society, as contrasted with imposition of the death penalty.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Idaho Code Section 19-2515 provides, in pertinent part, as follows:

> (c) Where a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the court finds at least one (1) statutory aggravating circumstance. Where the court finds a statutory aggravating circumstance, the court shall sentence the defendant to death unless the court finds that mitigating circumstances which may be presented outweigh the gravity of any aggravating circumstance found and make imposition of death unjust.

STATEMENT OF THE CASE

The Respondent, Richard A. Leavitt, was convicted of the first degree murder of Danette Elg. Pursuant to Idaho Code Section 19-2515, the trial court found the existence of aggravating circumstances which were not outweighed by the mitigating circumstances presented and thereupon sentenced the Respondent to death.

On review of Leavitt's sentence and conviction, the Idaho Supreme Court set aside the death sentence on grounds that the trial court failed to adequately consider and weigh mitigating circumstances against any aggravating circumstance, and that the trial court failed to give adequate consideration of alternative sentences "which exist between the distant poles of 'rehabilitation and possible probation' or the death penalty." App. 14. From its review of the record, the state court ruled that the trial court's consideration and weighing of the mitigating

circumstances was inadequate as the trial court assessment of the mitigating circumstances was that: "It is only that they are as feathers on the scale when balanced against the grossly inhumane act of murder that went beyond all human decency." App. 13. The Idaho Supreme Court further found that the mitigating circumstances as set forth by the trial court presented a defendant "who is atypical to any that this Court has viewed in the context of a death penalty case." App. 13.

ARGUMENT

I. LACK OF JURISDICTION

The court lacks jurisdiction to review the present case, and Leavitt therefore respectfully urges the court to refrain from doing so. Leavitt believes that the court lacks jurisdiction because any decision rendered by the court in this case would be merely advisory. Traditionally, the court has recognized that judicial power conferred by the Constitution is power to determine actual controversies arising between adverse litigants and that the court should not give opinions in the nature of advice. Muskrat v. United States, 219 U.S. 346 (1911). A test for the existence of an advisory opinion was stated in Herb v. Piticairn, 324 U.S. 117 (1945).

> We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the State Court after we corrected its views of Federal Law, our review could amount to nothing more than an advisory opinion.

Id. at 126.

On the issues presented in the State's Petition, there is no actual controversy, there are no adverse litigants, and an opinion rendered by this Court would be merely advisory. This case involves no adversary litigants. It has merely been remanded for resentencing. The parties before the court at this time are actually the State of Idaho v. "a decision of the Idaho Supreme Court" and consequently, this court's decision will have no effect on the fate of Richard Albert Leavitt.

II. NO CONFLICT ON FEDERAL LAW ISSUES - LACK OF SUBSTANTIAL QUESTION

Even if the court finds that there is jurisdictional basis on which to review this case, Leavitt urges the court to deny the requested review because there are no "special" and "important" reasons for granting said review. More specifically, the Idaho court's decision is not in conflict with the decisions of other state courts, federal courts, or the United States Constitution.

Petitioner fails to cite even one decision of this court which is in conflict with the Idaho Court's interpretation of Idaho Code Section 19-2515(c). It is true that the Idaho legislature enacted the present death penalty statutes in response to relevant Opinions of this Court. However, all states have discretion to structure their system of death sentence imposition in their own way. Cabana v. Bullock, 474 U.S. 376 (1986). The Idaho legislature has complied with the mandate of this Court and has structured a system by which mitigating circumstances must be weighted against each aggravating circumstance individually prior to imposition of the death sentence. Idaho Code Section 19-2515(c).

The Idaho Court's interpretation and application of the Idaho death sentence statute does not conflict with the ruling of this Court. The fact that the Petitioner speculates that it will be difficult to weigh mitigating circumstances against each aggravating circumstance does not constitute a "special and important" reason for the Court to review this decision.

CONCLUSION

For the above-stated reasons, Richard Albert Leavitt respectfully requests that the Court deny the State's Petition for Writ of Certiorari.

RESPECTFULLY SUBMITTED this 30th day of September, 1989.

DAVID N. PARMENTER

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail on this 15th day of September, 1989, to: Lynn Thomas, Attorney General's Office, Statehouse-Room 210, Boise, ID 83720.

DAVID N. PARMENTER

1989 Opinion No. 78

IN THE SUPREME COURT OF THE STATE OF IDAHO
Nos. 16305/16987

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	Pocatello September 1988 Term
	)	
v.	)	Filed: May 30, 1989
	)	
RICHARD A. LEAVITT,	)	Frederick C. Lyon, Clerk
	)	
Defendant-Appellant.	)	
	)	
RICHARD A. LEAVITT,	)	
	)	
Petitioner-Appellant,	)	
v.	)	
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	

Appeal from the District Court of the Seventh Judicial District of the State of Idaho, Bingham County. Honorable H. Reynold George, District Judge.

This is an appeal from a conviction of first degree murder and the death sentence. Conviction affirmed; reversed and remanded on death penalty imposition.

David N. Parmenter, Blackfoot, Idaho, attorney for appellant.

Appendix "I"

Honorable Jim Jones, Idaho Attorney General; Lynn E. Thomas, Solicitor General, State of Idaho, attorney for respondent. Lynn E. Thomas argued.

SHEPARD, J.

This is an appeal from a conviction of first degree murder and a subsequent death sentence. We affirm the conviction of first degree murder, but reverse and remand for further consideration the imposition of the death penalty.

Sometime about July 18, 1984, the victim was brutally attacked in her bed. She suffered up to fifteen separate slash and stab wounds, some of which proved fatal. Her body had been further brutalized by the slashing removal of her sexual organs. The body of the victim was not discovered until three or four days following the killing. It is clear that the killing took place on the victim's waterbed which was punctured and torn by the attacker's knife. The combination of the body decomposition, together with the mixture of body fluids and the waterbed liquid, made impossible any determination of rape as a motive for the killing.

The defendant and the victim were both residents of the city of Blackfoot and knew each other. The victim had reported a prowling incident on the night of July 16, 1984, in which she advised the police that the prowler, thought to be the defendant, had tried to enter her home. During the incident the intruder had cut a window screen on the victim's home.

During the interim between the murder and its discovery, the defendant had contacted friends of the victim and also the police, expressing curiosity as to the victim's whereabouts. He claimed that co-workers and the employer of the victim had called him after she failed to appear at work. No such callers were ever located. After the murder and before the body was discovered, the Blackfoot police received two telephone calls stating facts thought to be capable of being only known to the murderer. The caller gave the name "Mike Jenkins" but no person by the name has ever been located. The prosecution asserts that logically the defendant was the only person who could have made

the calls because of his detailed knowledge. On July 21 the defendant obtained permission from the victim's parents to enter the home which had been locked and apparently unattended. With the help of the Blackfoot police, entry was made into the house and the body discovered.

The evidence pointing to the defendant as the murderer was largely circumstantial in nature. The defendant sustained a serious incise wound to his left index finger, and on the night of July 18, 1984, he was treated for that wound at the emergency room of the Bingham Memorial Hospital. Blood samples were gathered from the scene of the crime, and serology tests showed that two distinct blood types were present. The victim's blood was type A, and tests of the blood samples from the crime scene reveal that type O blood had been deposited contemporaneously with that of the victim's type A blood. The blood of sixteen suspects was tested and it was the serologist's opinion that the defendant was the only likely source of the type O blood. The defendant initially denied that his blood could be in the victim's bedroom, but later changed his story to admit he had been in the victim's bedroom and suffered a nosebleed, but contended the incident had happened one week prior to the murder. No explanation could be offered as to how his blood became mixed with that of the victim. The defendant asserted that he had cut his finger while in his own home attempting to upright a toppled fan. Laboratory tests of the Leavitt fan concluded that it lacked any blood residue or any indication it had been recently cleaned, and furthermore tests conducted with the fan were unable to duplicate the type of wound on Leavitt's finger. That "fan explanation" was abandoned by the defendant for the first time at trial wherein he admitted that he and his wife had perjured themselves and stated that the injury in fact had been sustained while he was attempting to prevent his wife from attempting suicide.

While confined in jail, the defendant wrote a letter to his wife containing specific instructions involving her future testimony. That letter was discovered and confiscated during a routine inspection of the jail. At trial the court ruled that the letter had been properly seized and it was used for impeachment purposes during the testimony of the

defendant's wife, and further used to impeach defendant's testimony as inconsistent statements.

At trial two witnesses testified to events offered to show the defendant's alleged morbid sexual curiosity, and his frequent possession and use of knives. The defendant's former wife testified that Leavitt had been observed excising and then pla ng with the female sexual organs of a deer. It was noted that the killer of the victim here had similarly mutilated the body by removing sexual organs from it during the fatal attack. The former mistress of the defendant testified that the defendant displayed a hunting knife prior to their engaging in sexual intercourse, which testimony suggested that the defendant used knives to increase his satisfaction during sexual intercourse.

Since the instant case involves a conviction of first degree murder and the imposition of the death penalty, we have carefully reviewed the record for any indication of prejudicial error occurring at trial, regardless of whether or not error has been specifically asserted by the defendant.

It is first asserted that the defendant was denied his right to a fair trial because of the extensive pretrial publicity given to the murder. We agree that Blackfoot is a relatively small community in which there would be wide knowledge of such a brutal murder, and that the crime in fact was widely reported. The defendant broadly asserts that a change in venue must be granted whenever there is widespread publicity regarding a crime. We disagree. The applicable rule has been outlined by this Court in *State v. Needs*, 99 Idaho 883, 890, 591 P.2d 130 (1979):

> Among the factors which this Court will consider in determining whether the criminal defendant actually received a fair trial are affidavits indicating prejudice or an absence of prejudice in the community where the defendant was tried, testimony of the jurors at voir dire as to whether they had formed an opinion of the defendant's guilt or innocence based upon adverse pretrial publicity, whether the defendant challenged for cause any of the jurors finally selected, and the nature and content of the pretrial publicity, and the amount of time elapsed from the time of the pretrial publicity to the trial itself. (citation omitted). Publicity by itself does not require a change of venue.

99 Idaho at 890.

We have examined the trial court record and conclude therefrom that the pretrial publicity had little if any effect on the potential jurors, and find no indication that potential jurors would prejudge the case. We further note that the record indicates that the defendant failed to object to the jury panel actually seated at trial.

The defendant asserts that his right to a fair trial may have been compromised by the presence of one member of the jury. Late in the trial defendant's counsel moved to reopen jury voir dire to examine an individual juror with regard to alleged statements by the juror prior to trial. The motion was denied. Defendant does not assert there was any evidence that the juror had formed an opinion as to defendant's guilt or innocence. During voir dire that juror had been examined and specifically stated, "anything that I have heard can be put off." Defendant's assertions are vague and uncertain, and we conclude that the trial court did not abuse its discretion in denying defendant's motion for additional voir dire following the seating of the juror. *State v. Sanger*, 108 Idaho 910, 702 P.2d 1370 (Ct.App. 1985). This Court in *State v. Needs*, 99 Idaho 883, 591 P.2d 130 (1979), stated, "[i]t was not incumbent upon the trial judge to find jurors who were totally ignorant of the facts and issues involved in this case." We find no indication in the record of any prejudice.

The defendant next asserts that alleged exculpatory evidence was not disclosed to the defendant. That "exculpatory" evidence related to a Blackfoot police dispatcher who had received the "Mike Jenkins" telephone calls. Following voice comparison tests the telephone dispatcher was unable to clearly identify Leavitt as the Mike Jenkins caller. The defendant argues that his rights to a fair trial and due process were prejudiced because the prosecution failed to disclose the inability of the police dispatcher to identify the voice of the caller. Defense counsel moved to reopen defendant's case-in-chief to require the dispatcher to testify as to her alleged opinion of the voice comparisons. The trial court denied defendant's motion on the grounds that the alleged testimony would be a subject for expert testimony. Prior to trial the police dispatcher had made a voice comparison of

the "Mike Jenkins" calls, and the defendant's voice as observed during his confinement. The dispatcher had prior to trial given the opinion that she thought the defendant and Mike Jenkins were one and the same person, but that she could not be sure. Therefore, the prosecution did not solicit her opinion at the time of trial. We cannot conclude that the testimony, if required, could be other than inculpatory of the defendant, and the prosecution did not fail to disclose exculpatory evidence. We do not necessarily agree with the trial court if its ruling was based on a perception that only expert witnesses are competent to identify the voices of telephone callers. *See State v. Fenley*, 103 Idaho 199, 646 P.2d 441 (Ct.App. 1982); I.R.E. 701. Nevertheless, we view the error, if any, to be harmless since the purported identity of the caller was not placed before the jury, and the testimony of the telephone dispatcher could only have been prejudicial to some extent to the defendant's case.

The defendant next asserts that the prosecution failed to preserve or disclose certain evidence and hence the defendant's right to due process was violated. It is also asserted that the trial court erred when it denied defendant's motion to exclude the prosecution's evidence of blood sample tests. Defendant argues that had additional blood samples been preserved, tests could have shown that the samples of his blood found in the victim's bedroom were in fact deposited at an earlier time than the victim's blood was deposited. In addition, he asserts that evidence tended to show that the body of the victim may have been mutilated by the cat of the victim. In all, defendant argues that he was denied the opportunity to perform various tests on the corpse of the victim prior to the time it was cremated. Those assertions of the defendant must be considered in the light of other evidence presented at trial. An expert serologist testified that tests showed convincingly that the blood samples had been mixed, thus supporting the conclusion that the two types of blood had been deposited contemporaneously. The pathologist testified extensively regarding the condition of the corpse at the time of the examination. There is no doubt as to the cause of death, and the nature of the victim's injuries. We do not accept the bare assertion of the defendant that additional blood samples may somehow

have been exculpatory. It is incumbent upon a defendant to demonstrate such exculpatory value. *United States v. Scott*, 789 F.2d 795 (9th Cir. 1986). As to the preservation of the corpse, there is no showing of any evidence to be gained therefrom, and the State has no duty to preserve such. *California v. Trombetta*, 467 U.S. 479 (1984). The appellant next argues that the trial court erred in refusing to suppress the testimony of State witness Wycoff. It is argued that the testimony of Wycoff had not been disclosed to the defense prior to trial. The Wycoff testimony involved his experiment to determine whether a particular type of knife may have been used in the slashing of the waterbed sheet found in the victim's home. It is asserted that defendant's preparation for trial was prejudiced by the non-disclosure of the Wycoff testimony prior to trial. The record is clear that the experiment conducted by witness Wycoff did not take place until the course of the trial, and hence no disclosure of that testimony prior to trial was possible. Hence, the pretrial disclosure rules are not applicable. *State v. Mosley*, 581 P.2d 238 (Ariz. 1978); *see also State v. Gerdau*, 96 Idaho 516, 531 P.2d 1161 (1975). Additionally, even assuming that pretrial disclosure rules somehow do apply, there must be a showing that the late disclosure denied a defendant a fair trial. *State v. Smoot*, 99 Idaho 855, 590 P.2d 1001 (1978). Here defendant has made no such showing.

The defendant next asserts that the trial court erred in three evidentiary rulings. The defendant first asserts that error was committed when certain color photographs of the victim's corpse in an advanced state of decomposition, were admitted in evidence. Defendant cites *State v. Martinez*, 92 Idaho 183, 439 P.2d 691 (1968) as authority for his assertion of error. Therein the Court dealt with the need to balance the probative value and relevance of such evidence against resulting prejudice to the defendant. We agree with the *Martinez* balancing rule. However, in the instant case, although the photographs were admittedly gruesome in nature, clearly they were necessary to show the nature of the crime and the type of wounds inflicted upon the body. The jury is entitled to have an accurate picture of all the circumstances, and although such information may be gruesome in nature it is necessary to make an intelligent fact finding decision. *State v. Izatt*, 96

Idaho 667, 534 P.2d 1107 (1975). Since the photographic evidence is relevant, there is no objection on the basis that it could be presented in a somehow less graphic form. The State is not obligated to present evidence which has a lesser impact. *State v. Rollo*, 351 P.2d 422 (Or. 1960).

The defendant next contends that the court erred in permitting certain testimony by the defendant's former wife. The trial court permitted that witness to testify to defendant's activities while on hunting trips in removing the sexual organs of game animals. That testimony was admitted on the basis that it was relevant because of the mutilation and removal of the sexual organs of the victim. Defendant argues that I.R.E. 403 required exclusion of that evidence because its probative value is greatly outweighed by its prejudice and tendency to inflame the jury. We disagree. The fact that certain evidence is horrifying and gruesome, is not in and of itself sufficient reason for exclusion. In the instant case the corpse of the victim had been brutalized by the removal of her sexual organs by a person who clearly had certain anatomical knowledge. That evidence tended to indicate that the defendant had a morbid and sadistic interest in sexual organs, had a knowledge of anatomy, a possible motive for the crime, and a modus operandi which tended to identify the defendant as the killer. Certainly that evidence was prejudicial to the defendant, however, almost all evidence in a criminal trial is demonstrably admitted to prove the case of the state, and thus results in prejudice to a defendant. The evidence was probative and the trial court did not err in its ruling as to its admissibility.

It is next asserted that the trial court, in the face of a marital privilege objection, erred in admitting a document obtained from the defendant while he was housed in the county jail. We find no circumstances demonstrating any relevance to marital privilege. Leavitt denied that the document constituted a letter to his wife, and denied any intent to deliver the document to his wife. Rule 405(b) only addresses compelled testimony from a spouse of a privileged communication. Hence, no marital privilege is applicable. Likewise, we find no work product privilege. The document was confiscated during a routinely conducted protective search of jailhouse inmates entering and exiting the facility.

Lastly, it is argued that no proper foundation was laid for the admissibility of the document. The State argued admissibility on the basis that the document contained an account of the facts conflicting with that attested to by the defendant under oath. Accordingly, the document was admissible for impeachment purposes. If the facts stated in the document were correct, then clearly the defendant had perjured himself during his testimony. Thus, the document was admissible to impeach the defendant's testimony.

Following trial and conviction, defendant filed his motion for a new trial on the basis that newly discovered evidence indicated a possible mental disease of the defendant. Defendant asserts that such possible mental disease or deficiency may show his inability to premeditate and form any intent to commit murder. A motion for a new trial is directed to the sound discretion of the trial court, and its decision thereon will not be disturbed absent an abuse of discretion. A motion for a new trial based on newly discovered evidence must satisfy the following test: 1) that the evidence is newly discovered and unknown to the defendant at the time of trial; 2) that the evidence is material and not merely cumulative or impeaching; 3) that it will probably produce an acquittal; and 4) that failure to learn of the evidence was due to no lack of diligence on the part of the defendant. *State v. Ames*, 112 Idaho 144, 730 P.2d 1064 (Ct.App. 1986).

The motion for a new trial was denied by the trial court on the basis that the asserted newly discovered evidence was not material. We agree. During all of the original trial proceedings the defendant denied involvement with the killing of the victim. That is a completely different defense than one now asserted which admits the criminal act, but denies culpability on the ground of inability to form the requisite intent. Further, the proffered psychological tests [which were considered by the trial court] indicate that the defendant purportedly suffers from anti-social personality disorder and an intermittent explosive disorder. There is no indication in the proffered evidence that either of those illnesses would have prevented the defendant from forming the requisite intent to murder.

The defendant next contends that he was denied his sixth amendment constitutional right to effective assistance of counsel. All of defendant's asserted deficiencies of counsel

deal with disagreements with strategic judgments of his trial counsel. We held in *Estes v. State*, 111 Idaho 430, 725 P.2d 135 (1986), that such judgments of trial counsel will not be disturbed unless found to be objectively unsound. *See also Strickland v. Washington*, 466 U.S. 668 (1984). We have reviewed the record as a whole, and it is clear that in the exercise of trial strategy, defense counsel did not always follow defendant's requests. We find no error. Indeed, as acknowledged in defendant's brief on this appeal, trial counsel refused to call two police officers as witnesses for the defense, but only because of counsel's knowledge that their testimony would have been prejudicial to the defendant, and would have made a poor impression on the jury. Even if some of counsel's decisions at trial were erroneous, they must have been so serious as to deprive the defendant of a fair trial. *Paradis v. State*, 110 Idaho 534, 716 P.2d 1306 (1986). We hold defendant was not denied effective assistance of counsel.

The defendant next asserts prosecutorial misconduct at trial, arguing that the closing argument of the prosecution was improper. We first note that since no objection was made thereto during the course of final argument, such assertion will ordinarily not be considered on appeal. Nevertheless, we have considered defendant's assertion and examined the record. We note that the trial court excluded the charge of rape from the charges to be read to the jury. Further, we note that it is not misconduct to argue rape as a motive for murder, even though a charge of rape may not be before the jury. *State v. Izatt*, 96 Idaho 667, 534 P.2d 1107 (1975), wherein the Court noted a jury is entitled to have a full picture of the criminal offense even though uncharged crimes may be mentioned. The ultimate question is whether the prosecutor misrepresented the record, and we hold that there was no such misrepresentation.

Finally, we turn to the propriety of the imposition of the death sentence. We begin our inquiry by examining I.C. § 18-4003 which prescribes the degrees of murder. We may immediately eliminate certain subsections of that statute which define first degree murder, i.e., a murder of a peace officer, etc., a murder committed by a person under a sentence for murder, a murder committed by a person incarcerated in a penal institution, and a

murder while attempting escape from a penal institution. Likewise, under the record in this case, because of the unusual circumstances, the prosecution was unable to prove, the trial court was unable to find, and this Court is unable to conclude, that the murder fell within the constraints of subsection (d), as committed in the perpetration of arson, rape, robbery, burglary, kidnapping or mayhem. While the record here may be viewed as pointing toward one committed in the course of rape, the record indicates no proof of such beyond a reasonable doubt.

However, there is no doubt that the crime in question here falls within the provisions of I.C. § 18-4003(a), which provides:

> (a) All murder which is perpetrated by means of poison, or lying in wait, or torture, when torture is inflicted with the intent to cause suffering, to execute vengence, to extort something from the victim, or to satisfy some sadistic inclination, or which is perpetrated by any kind of wilful, deliberate and premeditated killing is murder of the first degree.

Here the record is clear that the murder in question was "perpetrated" with the intent to cause suffering or to satisfy some sadistic inclination.

I.C. § 19-2515 sets forth the requirements as to findings constituting mitigating or aggravating circumstances, and defines "statutory aggravating circumstances." Said statute in subsection (g) thereof defines statutory aggravating circumstances, and requires that "at least one (1) of which must be found to exist beyond a reasonable doubt before a sentence of death can be imposed." We deem that certain of the subsections of (g) may be immediately eliminated as applicable "statutory aggravating circumstances" in the case at bar, i.e.:

1. The defendant was previously convicted of another murder.
2. At the time the murder was committed, the defendant also committed another murder at the same time.
3. The defendant knowingly created a great risk of death to many persons.
4. The murder was committed for remuneration.

. . . .

7. The murder. . .was. . .one defined by I.C. § 18-4003(b), (c), (d), (e), or (f). . .

. . . .

9. The murder was committed against a former or prese. ace officer. . . .

10. The murder was committed against a witness or potential witness. . . .

Hence, we hold that statutory aggravating circumstances, at least one of which must be found to exist beyond a reasonable doubt before a sentence of death can be imposed, must be found within the strictures of I.C. § 19-2515(g)(5) or (6), i.e., that the murder was especially heinous, atrocious or cruel, manifesting exceptional depravity, or that the murder exhibited utter disregard for human life. The findings of the trial court in its pronouncement of sentence, as well supported by the record, indicate that the murder was especially heinous, atrocious and cruel, and manifested exceptional depravity. Hence, we hold that at least one of the "statutory aggravating circumstances" was found to exist beyond a reasonable doubt, and that finding of the trial court is supported by the record herein.

I.C. § 19-2515(d) requires that in all cases in which the death penalty may be imposed, the sentencing court shall, after conviction, obtain a presentence investigation and convene a presentencing hearing. Subsection (e) provides that after said investigations and hearings, the court shall make written findings setting forth any statutory aggravating circumstance and set forth in writing any mitigating factors considered. Thereafter, the statute requires that "if the court finds that mitigating circumstances outweigh the gravity of any aggravating circumstance found so as to make unjust the imposition of the death penalty, the court shall detail in writing its reasons for so finding."

As above noted, the record clearly supports the finding of the trial court that the murder was "especially heinous, atrocious or cruel, manifesting exceptional depravity," within the strictures of I.C. § 19-2515(g)(5). However, we deem it equally clear that while

the court made adequate written findings setting forth the statutory aggravating circumstances, the record fails to detail any adequate consideration of the "mitigating factors" considered, and whether or not the "mitigating circumstances" outweigh the gravity of any "aggravating circumstance" so as to make unjust the imposition of the death penalty.

Here the trial court, with adequate factual basis therefore, found that the murder herein was especially heinous, atrocious, cruel and manifested exceptional depravity. The trial court proceeded to consider prior events testified to by another woman, and stated, "who knows, taking the psychological makeup of this defendant, that another life may have been snuffed out. The court makes reference to this to help substantiate the conclusion that there is a propensity to commit murder constituting a continuing threat to society." Therein the trial court made reference to an event which did not happen, and utilized that speculation to arrive at a conclusion that the defendant herein had a propensity to commit murder, and would constitute a continuing threat to society. We disapprove such a line of reasoning.

As indicated above, we do not disagree with the conclusion of the trial court that the instant murder was cruel, inhuman, and depraved. However, such a finding does not discharge the statutory duty imposed upon a sentencing court to consider mitigating factors. Although the "mitigating" factors concerning this defendant were set forth by the trial court, the trial court stated: "It is only that they are as feathers on the scale when balanced against the grossly inhumane act of murder that went beyond all human decency."

It is clear that the trial court, while detailing the so called "mitigating" circumstances, clearly failed to adequately consider them and weigh them as against any "aggravating" circumstance. We deem the "mitigating" circumstances as set forth by the trial court to be a demonstration that the instant case presents a defendant who is atypical to any that this Court has viewed in the context of a death penalty case. As stated by the sentencing court, the defendant comes from "a law abiding family, and he is presently married; has a child and was steadily employed prior to his arrest. He is a son, a husband, a father who has conducted himself much of the time within the norms of society." Such a

recitation gives us pause. We note that such recitation of the trial court gives the defendant herein considerable benefit of the doubt. The record demonstrates that the defendant shows no remorse or excuse for his acts, but nevertheless at all times has, and continues to maintain complete innocence. The criminal record of the defendant is lengthy, but as noted, he has never prior to the instant circumstances been convicted of a felony. Nevertheless, the presentence report demonstrates the probability that defendant has committed felonious acts of rape and arson. Hence, we surmise the trial court accepted for the sake of argument, a reasonably decent character of the defendant prior to the instant offense.

We view the record before this Court as demonstrating that the trial court considered "and all of these [mitigating factors] would be important mitigating circumstances if the consideration was toward rehabilitation and possible probation." (Emphasis added.)

We do not disagree with the findings of the trial court that the defendant herein is possessed of an "intermittent explosive disorder." Nor do we disagree with the trial court's characterization of the instant crime as being demonstrably cruel, heinous and depraved. Nor do we disagree with the trial court's conclusion that the defendant has shown no remorse, but indeed has continued to deny any participation and to attempt to manipulate other witnesses or evidence.

Nevertheless, we disagree with what we perceive to be the trial court's misperception of the alternatives available to him as a sentencing court. While the defendant's personality and psychological makeup may make the possibility of "rehabilitation and possible probation" non-existent, nevertheless the trial court failed to give adequate consideration of the alternatives which exist between the distant poles of "rehabilitation and possible probation," or the death penalty. Clearly, alternatives were and are available to a sentencing court, such as a fixed life sentence.

We venture no opinion as to the desirability of the imposition of a penalty less than a death sentence in the instant case. It is sufficient to say that such alternatives do exist

in the instant case, and are within the discretion of the sentencing court. On the other hand, it is clear in the instant case, given the circumstances of the crime, that it was especially heinous, atrocious and cruel, and such circumstances may outweigh any mitigating circumstances. Nevertheless, on the present record we hold that the decision of the trial court does not demonstrate an adequate weighing of mitigating circumstances against the aggravating factors. Neither does the record demonstrate that the trial court adequately considered long-term penal confinement as an adequate protection of society, as contrasted with the imposition of the death penalty.

Pursuant to I.C. § 19-2827, we determine that the sentence herein was not imposed under the influence of passion, prejudice or other arbitrary factors; that the evidence supports the finding of a statutory aggravating circumstance (I.C. § 19-2515); and that the sentence of death is not excessive or disproportionate to the penalty imposed in similar cases.

For all of the above considerations, we affirm the judgment of conviction of first degree murder, but we reverse the trial court's imposition of the death penalty and remand to the trial court for further consideration in light of this opinion. The trial court is, in its discretion, authorized to convene additional hearings and obtain additional information and/or testimony.

Affirmed in part, reversed in part.

BAKES, C.J., HUNTLEY and JOHNSON, JJ. concur.

JOHNSON, J., concurring specially.

I concur with the opinion of Justice Shepard and write only to point out that the trial court appears to have weighed the mitigating circumstances against two aggravating circumstances, collectively instead of separately, contrary to our holding in *State v. Charboneau,* 1989 Slip. Op. No. 44, 1989 WL 31849 (Idaho), 1989 Ida. Lexis 53.

In its "Pronouncement of Sentence" the trial court found that the murder was "especially heinous, atrocious or cruel, manifesting exceptional depravity" and that Leavitt "exhibited utter disregard for human life." These are two of the aggravating circumstances

listed in I.C. § 19-2515(g). In pronouncing the sentence of death on Leavitt, the trial court stated: "The laws of the sovereign State of Idaho give clear direction to the Court that unless the mitigating circumstances outweigh the gravity of the aggravating circumstances, the defendant shall be sentenced to death." (Emphasis added.)

In *Charboneau* we held that "the trial court may sentence the defendant to death, only if the trial court finds that all the mitigating circumstances do not outweigh the gravity of each of the aggravating circumstances found and make imposition of death unjust." 1989 Slip Op. No. 44 at 42, 1989 WL 31849 (Idaho) at 59, 1989 Ida. Lexis 53 at 69. On remand, the trial court should weigh all the mitigating circumstances against each of the aggravating circumstances found, separately, rather than weighing all the mitigating circumstances against all aggravating circumstances found, collectively.

BISTLINE, J. concurring and dissenting.

Accepting that there are insufficient votes to reverse and remand for a new trial, then I concur only in the result of the majority opinion which sends this case back for proper resentencing. I agree with Justice Johnson's statement that upon resentencing the trial judge must apply principles enunciated in our recent *State v. Charboneau*.

Otherwise I generally cannot agree with the majority opinion's pronouncements on the following issues: (1) the admission of the photographs of the decomposed body of the victim; and (2) the admission of the testimony of the defendant's former wife regarding the defendant's field-dressing of game animals.

A glance at some of the exhibits that the jury had with them during their deliberations and a very quick delving into the transcript of this case makes it all too clear that this was a trial rife with evidence unduly prejudicial to the defendant. Photographs of the victim's decomposed body are the best example of this proposition. At the outset it should be noted that the majority opinion places undeserved reliance upon the brief of the solicitor general in making the following statement:

> Since the photographic evidence is relevant, there is no objection on the basis that it could be presented in a somehow less graphic form.

> The State is not obligated to present evidence which has a lesser impact. *State v. Rollo*, 351 P.2d 422 (Ore. 1960).

Majority Opinion, p. 8.

The State's brief provided us with this statement:

> When photographic evidence is relevant, it is not a ground for objection that it could be presented in less graphic form. The State is not obligated to rely on evidence having the least impact. *See, State v. Rollo*, 351 P.2d 442 (Ore. 1960).

This state of affairs would not be objectionable if reliance on the Oregon case was justified -- but it is not. A reading of the underlying *Rollo* opinion reveals no such proposition which the majority opinion, following the solicitor general's lead, has drawn from it.

However, more important is the substantive law relating to the admission photographic evidence, and the way in which this photographic evidence was handled. The majority opinion on page 7 claims that the photographs were necessary to show the nature of the crime and the type of wounds inflicted upon the victim's body. However, defendant's counsel was prepared to stipulate that the victim was murdered by knife wounds and to every other fact regarding the state of the victim's body when it was discovered. Tr., Vol. 2, p. 314. Thus, where none of the information conveyed by the photographs was at issue, the photographs were not material, but were irrelevant and cumulative. This same information could have been provided by a coroner's testimony.

If the photographs were not relevant because they did not provide evidence of facts at issue, they should have not been admitted. That the photographs are highly inflammatory renders them even less admissible. These photographs were 8 inch by 12 inch color photos of the victim's body in a shocking state of mutilation and decomposition. State's Exhibit No. 23 was a close up view of the victim's rectal area through which the sexual organs had been removed. Others were close up views of neck wounds which allowed partial views of the victim's face. Interestingly, State's Exhibits 4 and 5 were

photos of the victim in life. Exhibit No. 4 was a close up full face portrait of the victim; Exhibit No. 5 was a photo of the victim with family members. All of these photos were in the jury room with the jury during their deliberations. It requires no great leap of imagination to picture what must have gone through the jurors' minds as they compared the photos of the victim in happy days with her family members in life as against the horrifying photos of her body in death. Since defendant's counsel was willing to stipulate to any information which the photos could convey, the district court should have recognized that it would be an abuse of discretion to admit these incendiary photos into evidence. It must be remembered that at the time these photographs were admitted in evidence the defendant was an accused person presumed to be innocent. This leads to the question: Was this a fair trial where such inflammatory pictorial evidence was admitted in a trial where there was no question but that murder had been committed, and the issue to be resolved was whether the accused was the perpetrator? This is especially so here where as the majority itself has noted the State's case rests on circumstantial evidence.

In passing on the admissibility the photographs, Justice Shepard properly acknowledges *State v. Martinez*, 92 Idaho 183, relied upon by defendant, "Therein the Court dealt with the need to balance the probative value and relevance of such evidence against resulting prejudice to the defendant. We agree with the *Martinez* balancing rule." The next sentence, however, after conceding that "the photographs were admittedly gruesome in nature," then asserts -- without explaining why or how -- that the photographs "were necessary to show the nature of all the circumstances, and although such information may be gruesome in nature it is necessary to make an intelligent fact finding decision." Slip Op., p. 7.

The statement that the photographs were necessary is sheer *ipse dixit* which does not include therein any balancing of prejudice versus probative value, which was said to be the rule of *Martinez*. Moreover, if *Martinez* included any issue of gruesome photographs having been admitted at trial I am uninformed by reading it. "Martinez was

charged with the second degree murder of one Michael Anthony Calborn, a two-year ten-month old infant" who died as a result "of injuries alleged inflicted by (defendant's) repeated kicking and striking the deceased's body." 92 Idaho at 184.[1] On appeal of *Martinez's* conviction, Justice Spear in authoring the Court's unanimous opinion, noted as to a contention that the photographs were inadmissible, that "they were admitted for the stated purposes of identification, as an aid to the jury in understanding the nature and extent of the injuries, and as probative of implied malice, *i.e.*, that appellant had acted with an abandoned and malignant heart . . . The record shows that the trial court carefully considered objections . . . for the state's purposes hereinbefore mentioned." 92 Idaho at 188.

Justice Shepard, for a majority, says only as to the admission of the photographs, "that although such information may be gruesome in nature it is necessary to make an intelligent fact-finding decision" (Slip Op., p. 7.) citing *State v. Izatt*, 96 Idaho 667, for the quoted proposition. *Izatt* in an interesting case, but on four or five readings of it, I marvel at it being cited by the majority for the proposition it is said to support, which is the more remarkable because Justice Bakes who today joins Justice Shepard's opinion, authored *Izatt*. Neither *Izatt* nor *Rollo* substantiate the propositions for which they are offered.

Along the same lines of unnecessary prejudice was the admission of the testimony of the defendant's former wife regarding the defendant's activities while field-dressing game animals. While it may have contained some kernel of relevance concerning the specific type of mutilation of the victim's body in this case, for certain the testimony was highly prejudicial. It allowed the prosecution to portray the defendant as a grotesque deviant, which in the mind of the average juror would lead to the conclusion that defendant was a bad person, and therefore he likely was the person who committed the murder. The

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[1] It is of interest to note that a similar infant homicide, *State v. Stuart*, 110 Idaho 163, 715 P.2d 833 (1986), resulted in a charge of torture murder, a conviction, and a death sentence.

majority's statement that the prejudicial effect of this evidence was inconsequential because almost all evidence in a criminal trial is prejudicial to a defendant misses the point. Evidence to obtain a conviction is and is intended to be prejudicial. That is a given. But it should be evidence relating to the crime committed.

As one delves into the record it becomes apparent that the district court was overly kind in allowing the prosecutor to have admitted virtually any evidence which it presented. The defendant's wife was allowed to testify as to the defendant's obsession with knives. Actual knives were allowed to be introduced into evidence, not withstanding that there was no contention that such were murder weapons. These were knives which the defendant happened to own. These knives had absolutely no relevance to the case. Other evidence, on a par with photographs of the victim admitted into evidence included photographs of an anatomically correct life-sized female doll which was graphically altered to demonstrate the victim's wounds. The jury entered upon its deliberation in a jury room reeking of the unfair prejudice from evidence which the prosecution did not need to show that the victim had been murdered, and the defendant may have been the perpetrator.

Supreme Court of the United States

No. 89-176

Idaho,

Petitioner

v.

Richard A. Leavitt

ON CONSIDERATION of the motion of respondent for leave to proceed in forma pauperis,

IT IS ORDERED by this Court that the said motion, be, and the same is hereby, granted.

October 16, 1989

Supreme Court of the United States

No. 89-176

Idaho,

Petitioner

v.

Richard A. Leavitt

ON PETITION FOR WRIT OF CERTIORARI to the Supreme Court of Idaho, No. 16305/16987.

ON CONSIDERATION of the petition for a writ of certiorari herein to the Supreme Court of Idaho.

IT IS ORDERED by this Court that the said petition be, and the same is hereby, denied.

October 16, 1989

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No. 89-176

THE STATE OF IDAHO,

Petitioner,

v.

RICHARD A. LEAVITT,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF IDAHO

I, Harry B. Otis, a member of the Bar of the Supreme Court of the United States, hereby certify that on July 28, 1989, Cockle Printing, Omaha, Nebraska, to the best of my knowledge, mailed 40 copies of the brief in the above entitled case, by first class mail, postage prepaid, to your office for filing.

Harry B. Otis

As a member of the U.S. Supreme Court Bar

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PATRICIA C. BILLOTTE
My Comm. Exp. Nov. 24, 1992

Patricia C. Billotte

Notary Public

APPEARANCE

SUPERME COURT OF THE UNITED STATES

No. 89-176

STATE OF IDAHO	RICHARD A. LEAVITT
Petitioner	Respondent

The Clerk will enter my appearance as Counsel for State of Idaho who IN THIS COURT IS Petitioner.

I certify that I am a member of the Bar of the Supreme Court of the United States:

Signature: Lynn E. Thomas

Name: Lynn E. Thomas

Firm: Office of the Attorney General

Address: Statehouse, Room 210

City & State: Boise, Idaho Zip: 83720

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I, Linda Chloupek, of lawful age, being duly sworn, upon my oath state that I did, on the 28 day of July, 1989, place in the U.S. Post Office in Omaha, NE 1 package(s) containing 3 printed copies of PETITION FOR WRIT OF CERTIORARI in the following case:

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RICHARD A. LEAVITT, Respondent.

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Affiant

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I am duly authorized under the laws of the State of Nebraska to administer oaths.

GENERAL NOTARY-State of Nebraska
PATRICIA C. BILLOTTE
My Comm. Exp. Nov. 24, 1992

Patricia C. Billotte
Notary Public

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